

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

RALPHS GROCERY COMPANY

and

Case 21-CA-147393

**ALFREDO ROBLES, an Individual
Charging Party**

*Margaret Serrano and Cecilia Valentine, Esqs.,
for the General Counsel.
Timothy Ryan, Esq. (Morrison & Foester LLP),
for the Respondent.*

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. On March 3, 2015, Alfred Robles (Charging Party or Robles) filed a charge against Ralphs Grocery Company (Respondent or Ralphs). Robles amended the charge on March 12, 2015. The Regional Director for Region 21 issued a complaint on August 27, 2015, and Respondent filed its answer on September 10, 2015, denying all material allegations in the complaint.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when, on September 16, 2014, Ralphs' chain manager, Kathy Culver (Culver), threatened to remove Robles from his position as a shop steward in order to discourage him from filing grievances and/or engage in other protected activity for the Teamsters Local Union No. 630 (the Union).

This case was tried before me in Los Angeles, California, on November 2, 2015. On the basis of the entire record, including the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel (General Counsel) and Respondent, I find that Respondent did not violate the Act as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

It is undisputed that Ralphs has been a corporation with retail stores and other facilities located throughout California, including a warehouse facility located at 14900 Garfield Avenue in Paramount, California (Paramount warehouse). Ralphs has been engaged in the operation of retail grocery markets.

During the 12-month period ending May 15, 2015, Respondent derived gross revenues in excess of \$500,000. At its Paramount warehouse, it purchased and received goods valued in excess of \$50,000 directly from points outside the State of California. Accordingly, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also undisputed that, at all material times, the Teamsters Local Union No. 630 has been the exclusive collective-bargaining representative for all bargaining unit employees at Respondent's facilities as they are described in Exhibits A through C of the collective-bargaining agreement (CBA) between the Union and Respondent.¹ Accordingly, Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Lastly, it is undisputed that, at all material times, Culver has held the position of Respondent's chain manager. Accordingly, Respondent admits, and I find that Culver has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

It is undisputed that Robles was employed by Respondent as an equipment operator. He worked the swing shift, Monday through Friday, at the Paramount warehouse. Culver served as the chain manager and Jeff Hall (Hall) served as manager at the Paramount warehouse.

Robles also served as the union shop steward during the swing shift. He served in that capacity for approximately five years. As a shop steward, Robles was responsible for providing employee members with information about their rights under the CBA and helping them resolve disputes with management.² If an employee reported a workplace issue to Robles, he typically consulted with the employee to obtain background information on the dispute, researched/ascertained whether the dispute constituted a contract violation, and, if the issue could not be resolved informally, assisted the employee with filing a grievance. However, before a grievance was filed, protocol required Robles to meet with Respondent's management to try to resolve the dispute informally.

It is undisputed that, in July 2014, Hall and Culver complained to union business agent Jose Ortiz (Ortiz) that Robles was not following grievance protocol. Specifically, Culver told Ortiz that Robles often filed formal grievances without first instructing the employee to consult with management first to see if they could resolve the matter informally. Culver also told Ortiz that Robles was spending excessive amounts of time investigating grievances during work hours (versus during his break time) without first clearing the time with management.

¹ Tr. at 19–20; see also GC Exh. 2 at 33–35.

² Tr. at 23–24, 45–46.

After investigating the matter, Ortiz agreed with Culver that Robles was not following protocol. Ortiz spoke to Robles about the matter and Robles agreed that, going forward, he would follow grievance protocol per the CBA. However, problems persisted between Robles and management.

B. Threatened to Remove Robles as Swing Shift Shop Steward

On September 15, 2014, Robles was investigating another employee grievance during work hours. Apparently, Robles' immediate supervisor told him that he was spending too much time during work hours investigating grievances. Robles disagreed, and he and his supervisor began arguing about the matter. According to Robles, his supervisor continually interrupted him while Robles tried to explain that it was his duty as shop steward to investigate employee grievances. However, Robles' supervisor kept insisting that he was not following protocol by investigating grievances during work hours.

Dissatisfied with the conversations with his supervisor, Robles went to Hall about the matter. Hall informed Culver of the situation. Ultimately, Robles was issued a written warning for failing to follow company rules and regulations and misusing company time/unauthorized breaks.³

On September 16, 2014, the union and management held a scheduled grievance meeting to discuss the merits of several grievances that had been filed against Respondent. Ortiz, Robles, and another union representative Steve Alvarez (Alvarez), represented the union. Hall and Culver represented management.

The parties initially began discussing a grievance involved employee Buliavac. Robles testified that, during their discussion about Buliavac, Culver became angry and asked if he assisted Buliavac with his grievance. Robles hesitated to answer but ultimately answered affirmatively. Once the conversation moved to the second grievance, involving employee Roscon, Robles testified that Culver became angry with him for filing a formal grievance in the matter. For her part, Culver denied becoming angry or confrontational in discussing either of these grievances.

At some point during the September 16 meeting, either Ortiz or Robles brought up the subject of Robles' written warning.⁴ While there were considerable discrepancies about what was said concerning Robles' written warning, I find the following facts occurred. Robles did not agree with the written warning and was concerned that the warning would be used as progressive discipline against him in the future. In response, Culver replied that Robles' warning was justified, because he had been previously counseled that: (1) he had not been following grievance protocol (i.e., moving too quickly to filing a formal grievance without meeting with management to discuss it informally) and (2) he should not conduct

³ GC Exh. 3.

⁴ Ortiz and Robles testified that Ortiz brought up Robles' written warning during the meeting. However, Culver testified that Robles raised the issue. However, it makes no difference who raised the issue; what's important here is that the issue was raised during the meeting.

union business during work hours. Culver also told Robles that if he took responsibility for violating protocol, he would not have to worry about progressive discipline. Robles disagreed and he spent a considerable amount of time explaining to Culver that he was simply trying to do his job as a shop steward investigating an employee's grievance. Culver and Robles went back and forth on the matter. Although Robles and Ortiz testified that Culver displayed an angry tone and demeanor during their conversation, I find that, to the extent Culver appeared upset, it was due to her frustration with Robles' inability to appreciate why he was disciplined.

Nevertheless, after going back and forth with Culver about the written warning, Robles (and Ortiz) felt that the discipline was not justified. Culver again replied that if Robles could not take responsibility for his conduct, then Robles should consider discussing his duties as a shop steward with the Union and that Ortiz should consider re-training Robles on grievance protocols.

Ortiz and Robles testified that, after they discussed Robles' discipline at length, Culver asked Ortiz if the Union could remove Robles as the swing-shift shop steward. Ortiz replied that the Union could not do so, because Robles served in an elected position. According to Robles, Culver then told Ortiz if Robles' conduct [of not following protocol and using work time to investigate grievances] continued, she would speak with Ortiz's bosses to pursue having Robles removed as a steward.⁵ However, I do not find Robles' or Ortiz's version of the discussion credible.

First, I found Culver's testimony consistent throughout direct and cross-examination. She answered the questions fully and was neither vague nor evasive in her answers. Although Ortiz and Robles somewhat corroborated one another's testimony, I found that, oftentimes, their testimony was also consistent with Culver's version of events. Specifically, Ortiz and Robles admitted that, in July 2014, Robles had been warned about spending excessive amounts of work time investigating grievances, which corroborated Culver's testimony. Moreover, Robles admitted that Culver never told him directly that she would remove him from his shop steward position and both Ortiz and Robles admitted that management did not have authority to do so. Their testimony on this point was consistent with Culver.

Moreover, neither Ortiz nor Robles rebutted Culver's testimony that she: (1) often spoke with Ortiz about other stewards who failed to follow grievance procedures and/or (2) asked Ortiz to either re-train stewards or remind them that they need to confer with management beforehand to try to work out problems informally. In fact, Ortiz admitted that Culver often discussed her concerns about stewards following grievance protocol, which again corroborated Culver's testimony.

Most importantly, Ortiz's and Robles' testimony differ slightly regarding what Culver said in allegedly threatening Robles. Specifically, Ortiz testified that, at some point in the meeting, Culver asked him "*can we* [the Union] remove. . . Robles as a shop steward,

⁵ Tr. at 33, 38, 56.

to which Ortiz responded ". . . Robles is an elected official by his peers . . . we don't have the right to remove him as a shop steward."⁶ However, Robles testified that Culver "asked . . . Ortiz *to remove me* from being a shop steward" as opposed to asking if it was possible.⁷ Moreover, although Robles testified that Culver told Ortiz that she would "go over Ortiz's head" if Ortiz did not remove Robles as shop steward, Ortiz never mentioned Culver making that statement. Instead, Ortiz testified that Culver stated something to the effect that she ". . . would call Ernie [Lopez] and Emilio [Arias] [Ortiz's bosses] and see *if*—what they thought about it."⁸ For her part, Culver denied saying that she would speak to Ortiz's bosses about having Robles removed as shop steward, and I credit her testimony in this regard.

In any event, it is undisputed that the parties' conversation regarding Robles' written warning resulted in an impasse and their discussion concluded. No one from Ralphs ever contacted the Union about removing Robles as shop steward.

III. DECISION AND ANALYSIS

A. *The Parties' Positions*

The sole issue in this case is whether Respondent violated Section 8(a)(1) of the Act when Culver threatened to remove Robles from his position as shop steward. The General Counsel argues that Culver's statements were so coercive that her remarks reasonably interfered with Robles' ability to exercise his Section 7 rights on behalf of the Union. However, Respondent denies it violated the Act in any way, because: (1) Culver did not threaten Robles; and alternatively, (2) assuming the remark attributed to Culver was made, it was not so coercive that, objectively, it could reasonably be said to have interfered with Robles' Section 7 rights. Based on the totality of the evidence, I agree with Respondent.

B. *Prevailing Legal Authority*

The test for determining whether an employer's remarks are coercive does not "depend...on the successful effect of such coercion," rather, turns on whether the remarks may reasonably be said to have a tendency to interfere with the free exercise of an employee Section 7 rights.⁹ It is not necessary that the employee feel personally threatened by the remarks, or that the comment include a specific reference to union activity.¹⁰ Rather, threats must be viewed in light of the surrounding circumstances, and the trier of fact must essentially assess whether the employer's remark constituted an inquiry of what "could" occur (lawful) versus a statement of what "would" occur (unlawful threat).¹¹ While the employer violates the Act by communicating to a shop steward that s/he *will* suffer an adverse consequence as a result of that steward taking

⁶ Tr. at 33.

⁷ Tr. at 33, 55–56.

⁸ Id.

⁹ *Tasty Baking Co.*, 330 NLRB 560, 573 (2000), *enfd.* *Tasty Baking Co. v. NLRB*, 254 F.3d 114 (D.C. Cir. 2001).

¹⁰ Id. at 573.

¹¹ Id.

action to assist bargaining unit members,¹² the basic test to find an 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act.¹³

5 *C. Analysis*

Viewing all of the circumstances surrounding the September 16 meeting, I conclude that Culver never threatened to have Robles removed as a shop steward. Rather, I find that Culver told Ortiz (and Robles) that if Robles could not take responsibility for his conduct (in
10 failing to follow grievance protocol and conducting union business on company time), then Robles should consider discussing his duties as a shop steward with the Union and/or that Ortiz should consider re-training Robles on grievance protocols. In so finding, I rely on Culver's testimony which I found more credible than that of Robles and Ortiz.¹⁴

15 To support her assertions that Culver, more likely than not, made the threatening remark in question, the General Counsel points to Culver's angry tone and demeanor when, during the September 16 meeting, Culver "engaged in repeated confrontational exchanges" about the two grievances Robles was handling.¹⁵ However, the evidence fails to support the General Counsel's argument.

20 Rather, the record shows that, in the grievance involving employee Buliavac, Culver simply asked Robles whether he assisted Buliavac with his grievance. In the other grievance involving employee Roscon, the evidence shows that Culver merely pointed out that Robles was moving too quickly in filing grievances instead of following protocol to initially meet with
25 management to discuss the matter informally. Moreover, with regard to the tone of the meeting, I note that the nature of the meeting could have very well been adversarial since the purpose of the meeting was to discuss pending grievances and determine whether the Union and management could informally resolve any of them. Thus, while I do not believe Culver was "confrontational," to the extent she was, I find it was due to the nature, purpose, and subject
30 matter of the meeting coupled with Culver's frustration that Robles continually failed to follow grievance protocol and could not appreciate why he had been disciplined. Therefore, given the circumstances, Culver's demeanor and/or inquiries about these grievances cannot objectively be said to be unlawfully coercive under the Act.

35 The Board's decision in *Limbach Co.*, 337 NLRB 573 (2002), is instructive on the issue of unlawfully coercive statements. In *Limbach Co.*, the employer's sheet metal trade manager told a female employee that if she resigned as union steward or if the union business agent removed her as the steward, she would have a job with the employer as long as Respondent had

40 ¹² See *Consolidated Edison Co. of New York, Inc.*, 323 NLRB 910, 916 (1997); see also *Limbach Co.*, 337 NLRB 573, 589 (2002).

¹³ *American Freightways Co.*, 124 NLRB 146 (1959) (basic test is whether the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act).

45 ¹⁴ Even if Culver made the statement attributed to her, I conclude that her statement did not constitute a threat. Rather, I find that, because Ortiz and Robles did not agree that Robles should be retrained, Culver simply asked Ortiz whether it was possible for the Union to remove Robles since, in her opinion, he was not following protocol. When Ortiz told Culver that the Union could not remove Robles as shop steward, the discussion concluded.

¹⁵ GC Br. at 7.

work; but if the union business agent retained her [as the steward], she should blame the union not Respondent if she was fired. Administrative Law Judge (Judge) Nancy Sherman found the Respondent's manager's statement threatening and constituted an unlawfully coercive threat violating Section 8(a)(1).¹⁶ In so finding, Judge Sherman, in reviewing the totality of the evidence, found the nature of the statement itself coercive and agreed that the manager made the threatening statements attributed to him.¹⁷

However, unlike *Limbach Co.*, in this case, no direct, threatening statement was made. Rather, Culver simply stated that Ortiz consider re-training Robles on grievance protocol since Robles could not appreciate why he was being disciplined for repeatedly failing to follow the grievance protocol and conducting union business on company time. In fact, the credible testimony showed that Culver questioned Ortiz about other steward's ability to serve as shop steward when they violated protocol.

Most importantly, unlike *Limbach Co.*, where the judge discredited the manager's denials in finding a violation, here, I discredit Robles' testimony. Specifically, I found inconsistencies between Robles' and Ortiz's version of the meeting which made their testimony less than fully credible. Although the General Counsel argued that I should draw an adverse inference against Respondent (and in favor of Robles' and Ortiz's version of the meeting) since it never questioned the only other witness, Manager Hall, about his recollection of the meeting, I note the General Counsel never questioned Manager Hall about the meeting either. Nevertheless, even crediting Robles' version that Culver asked whether Ortiz could remove him as the shop steward, I do not find that this statement constituted a coercive threat under the circumstances.

Finally, Robles' credibility was further damaged when he was unable to state how Culver's statement interfered with his ability to carry out his duties as shop steward. Although Robles testified that he was fearful to represent other employees after Culver's remark, other than Robles' testimony, there was no credible evidence presented that anything (or anyone) prevented him from continuing his service as shop steward. In fact, Robles filed a grievance on behalf of the only swing-shift employee who filed a grievance after the September 16 meeting. He also represented another graveyard shift employee with their grievance. Thus, I find the discrepancies and inconsistencies in Robles' testimony coupled with the record at hand cast doubt on his veracity generally.


In short, based upon the totality of the circumstances, I conclude Culver never made the alleged threatening statement attributed to her. Rather, Culver's remark that if Robles could not take responsibility for his conduct then he should consider discussing his duties as a shop steward with the Union and/or that Ortiz should consider re-training Robles on grievance protocols cannot reasonably constitute an unlawful coercive threat. Alternatively, even believing that Culver asked Ortiz whether it was possible to remove Robles as shop steward when he failed to appreciate that he was disciplined for failing to follow grievance protocol and conducting union business on company time, I nevertheless conclude that this remark cannot reasonably be said to restrain, coerce, or interfere with Robles' rights under the Act.

¹⁶ *Limbach Co.*, 337 NLRB at 588.

¹⁷ *Id.* at 588-589.

Accordingly, I am persuaded that Respondent did not violate Section 8(a)(1) of the Act.
For that reason, I recommend that the complaint be dismissed.

Dated: Washington, D.C. March 1, 2016

A handwritten signature in black ink, reading "Lisa D. Thompson". The signature is written in a cursive, flowing style. It is positioned above a horizontal line.

Lisa D. Thompson
Administrative Law Judge